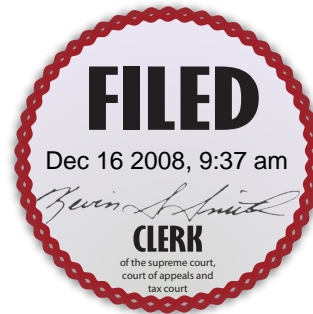


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GREGORY T. HILL,

Appellant/Defendant,

vs.

STATE OF INDIANA,

Appellee/Plaintiff.

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No. 71A05-0806-CR-378

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Jerome Frese, Judge
Cause No. 71D03-0307-FA-44

December 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Gregory T. Hill appeals from the trial court's denial of his motion for leave to file a belated motion to correct error. Because we conclude that the trial court did not abuse its discretion in determining that Hill had not exercised adequate diligence, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 30, 2003, in South Bend, Hill became involved in a melee with persons living across the street. At some point after Hill observed David Thompson assaulting Hill's brother, Hill fired several shots at Thompson and Thompson's girlfriend Denisha Hicks, striking both several times. On July 9, 2003, the State charged Hill with two counts of attempted murder, a Class A felony. On March 22, 2004, Hill pled guilty as charged. On June 18, 2004, the trial court sentenced Hill to twenty years of incarceration for each attempted murder conviction, to be served consecutively. The trial court did not advise Hill that he had the right to challenge his sentence on appeal, and no direct appeal was filed.

On July 6, 2005, Hill, *pro se*, moved for leave to file a belated notice of appeal and for the appointment of counsel. On September 6, 2005, the trial court appointed a St. Joseph County public defender to represent Hill. On February 13, 2006, the trial court sent a copy of the chronological case summary to Hill. On April 10, 2006, Hill wrote the trial court, claiming that he was still waiting to be contacted by his appointed public defender.

On April 14, 2008, Hill, by counsel, moved for leave to file a belated motion to correct error. On April 15, 2008, the trial court granted Hill's request. On May 15, the

State filed a motion to correct error, contending that Hill had failed to satisfy the requirements to file a belated motion to correct error.

On May 16, 2008, the trial court vacated that part of its April 15, 2008, order granting Hill leave to file a belated motion to correct error and set the matter for a hearing. On June 18, 2008, after a hearing, the trial court denied Hill leave to file a belated motion to correct error, concluding that he had failed to establish due diligence in challenging his sentence by a preponderance of the evidence.

DISCUSSION AND DECISION

The Indiana Post-Conviction Rules govern belated motions to correct error, and provide, in relevant part, that

[a]n eligible defendant convicted after a trial or plea of guilty may petition the court of conviction for permission to file a belated motion to correct error addressing the conviction or sentence, if:

- (1) no timely and adequate motion to correct error was filed for the defendant;
- (2) the failure to file a timely motion to correct error was not due to the fault of the defendant; and
- (3) the defendant has been diligent in requesting permission to file a related motion error under this rule.

Ind. Post-Conviction Rule 2(2).

The decision whether to grant permission to file a belated notice of appeal or belated motion to correct error is within the sound discretion of the trial court. The defendant bears the burden of proving by a preponderance of the evidence that he was without fault in the delay of filing and was diligent in pursuing permission to file a belated motion to appeal. There are no set standards of fault or diligence, and each case turns on its own facts....

Because diligence and relative fault are fact sensitive, we give substantial deference to the trial court's ruling.

....

A trial court's ruling on a petition for permission to file a belated notice of appeal under Post-Conviction Rule 2 will be affirmed unless it was based on an error of law or a clearly erroneous factual determination (often described in shorthand as "abuse of discretion"). The trial court is in a better position to weigh evidence, assess the credibility of witnesses, and draw inferences.¹

Moshenek v. State, 868 N.E.2d 419, 422-24 (Ind. 2007) (citations omitted).

We need not address the question of whether Hill was free from fault if we conclude that the trial court's conclusion that he was not diligent does not constitute an abuse of discretion.

The fact that a trial court did not advise a defendant about this right can establish that the defendant was without fault in the delay of filing a timely appeal. However, a defendant still must establish diligence. Several factors are relevant to this inquiry. Among them are the overall passage of time; the extent to which the defendant was aware of relevant facts; and the degree to which delays are attributable to other parties[.]

Id. at 424.

Here, Hill was sentenced in June of 2004 and first indicated a desire to appeal that sentence in July of 2005. The trial court apparently concluded that this initial delay was not Hill's fault and that he had exercised diligence, a conclusion that we believe is supported by the record. Hill testified that he did not have the opportunity to either visit the law library in prison or speak with other inmates until early 2005. A few months later, Hill filed his request for leave to file a belated appeal and for appointment of counsel.

¹ In cases where the court of appeals is reviewing a paper record, we give no deference to the trial court's factual findings. See *Houser v. State*, 678 N.E.2d 95, 98 (Ind. 1997).

The trial court, however, also concluded that Hill did *not* exercise diligence during the over two and one-half years following the appointment of a public defender in September of 2005. We cannot say that this conclusion constitutes an abuse of discretion. First, the overall passage of time, over two and one-half years with only two correspondences, both of which came within the first eight months following counsel's appointment, indicates a lack of diligence on its face. In the end, more than two years passed following Hill's letter to the trial court inquiring about his appointed counsel before he filed anything else or took any other action. Moreover, Hill was aware of the relevant facts, *i.e.*, that a public defender had been appointed, but did little to pursue the matter. There is no indication, for example, that Hill ever attempted to directly contact the St. Joseph public defender's office until at least February of 2008. Finally, while the trial court recognized that someone in the public defender's office had likely "screwed up[.]" it also noted that, over a period of two years, Hill never sent another letter to the trial court or *any* to the public defender's office, nor did he file "a complaint with somebody." Tr. pp. 67, 68. So, while some of the delay might properly be blamed on the St. Joseph public defender's office, the lion's share of the blame would seem to be Hill's. Given Hill's inability to explain the lengthy delay following the appointment of counsel, we conclude that the trial court did not abuse its discretion in denying him leave to file a belated motion to correct error.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.